

Letter of Findings Number: 09-1007P
Use Tax
For the Periods 2006-2008

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ISSUES

I. Use Tax—Applicability.

Authority: IC § 6-2.5-1-11.5; [45 IAC 2.2-4-2](#).

Taxpayer protests the imposition of use tax on "window stickers."

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer for sales and use tax for the years 2006 to 2008. As a result of the Department's audit, the Department issued proposed assessments of use tax, interest, and penalties. Taxpayer protested the use tax imposed on "window stickers" and the penalties imposed on the entire assessment. The Department conducted an administrative hearing and this Letter of Findings results.

I. Use Tax—Applicability.

DISCUSSION

Taxpayer protests the imposition of use tax on "window stickers." When Taxpayer wishes to sell a used vehicle, Taxpayer contacts a third-party vendor ("Vendor"). Vendor visits Taxpayer's location and Taxpayer provides the relevant information (make, model, features, mileage, etc.) to Vendor. Vendor takes the information and produces a "window sticker" which Taxpayer places on the appropriate vehicle. Vendor charges Taxpayer \$12.50 per "window sticker," while the paper used for the "window sticker" costs \$0.75 per "window sticker." The \$12.50 for the "window sticker" is not itemized. The issue is whether the transaction is the sale of tangible personal property.

For periods prior to January 1, 2008, [45 IAC 2.2-4-2\(a\)](#) provides:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

Under the test provided by [45 IAC 2.2-4-2](#), Vendor is primarily in the business of processing information given to it by Taxpayer or similar dealers. The tangible personal property is necessary to report the information presented to it by vehicle dealers. The tangible personal property in Taxpayer's case represents roughly six percent of the total service charge. Thus, Vendor met the statutory test for being a service provider and Taxpayer's purchases from Vendor were not retail transactions subject to sales and use tax.

Effective January 1, 2008, IC § 6-2.5-1-11.5 provides:

(a) This section applies to retail transactions occurring after December 31, 2007.

(b) "Bundled transaction" means a retail sale of two (2) or more products, except real property and services to real property, that are:

- (1) distinct;
- (2) identifiable; and
- (3) sold for one (1) nonitemized price.

(c) The term does not include a retail sale in which the sales price of a product varies, or is negotiable, based on other products that the purchaser selects for inclusion in the transaction.

(d) The term does not include a retail sale that:

- (1) is comprised of:

- (A) a service that is the true object of the transaction; and
- (B) tangible personal property that:
 - (i) is essential to the use of the service; and
 - (ii) is provided exclusively in connection with the service;
- (2) includes both taxable and nontaxable products in which:
 - (A) the seller's purchase price; or
 - (B) the sales price;of the taxable products does not exceed ten percent (10%) of the total purchase price or the total sales price of the bundled products; or
- (3) includes both exempt tangible personal property and taxable tangible personal property:
 - (A) any of which is classified as:
 - (i) food and food ingredients;
 - (ii) drugs;
 - (iii) durable medical equipment;
 - (iv) mobility enhancing equipment;
 - (v) over-the-counter drugs;
 - (vi) prosthetic devices; or
 - (vii) medical supplies; and
 - (B) for which:
 - (i) the seller's purchase price; or
 - (ii) the sales price;of the taxable tangible personal property is fifty percent (50%) or less of the total purchase price or the total sales price of the bundled tangible personal property.

The determination under clause (B) must be made on the basis of either individual item purchase prices or individual item sale prices.

Under IC § 6-2.5-1-11.5, the object of Taxpayer's transaction with Vendor is Vendor's processing of information on behalf of Taxpayer—a service under IC § 6-2.5-1-11.5(d)(1)(A). The "window sticker"—the potentially taxable part of the transaction, constitutes less than ten percent of the transaction as provided under IC § 6-2.5-1-11.5(d)(2). Thus, Taxpayer has met the two statutory elements necessary for its transactions with Vendor to not constitute a "bundled transaction" under IC § 6-2.5-1-11.5(d).

FINDING

Taxpayer's protest is sustained.

II. Tax Administration—Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty on the use tax imposed as a result of the Department's audit.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer states that its assessment resulted from the failure of its employees to properly scrutinize invoices to determine taxable items on which sales tax had not been charged and to properly understand laws governing computer software and promotional materials. While Taxpayer has acknowledged the results of the audit and has taken proactive steps to reduce the likelihood of such errors in future periods, Taxpayer has not provided sufficient information to justify penalty waiver for the years in question.

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest of use tax on "window stickers" is sustained. Taxpayer's protest of penalties is denied.

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